The Colorado Workmen's Compensation Act (Colo. Rev. Stat. Ann. Sec. 81-4-4, *as amended* 1967) provides that if an employer complies with the requirements of the Act and if an employee, who is injured, elects to receive benefits under the Act:

> "Such election and compliance *** shall be *** a surrender by the employer, his insurance carrier, and the employee of the rights to *** any cause of action, action at law *** or common law right or remedy or proceeding whatever for or on account of such personal injuries or death of such employee *** and shall bind the employee himself, *** his personal representatives, his widow and next of kin, as well as the employer [and] his insurance carrier ***."

The Colorado courts have consistently held that this provision acts to bar a suit by an employee against a co-employee for injuries sustained when both were acting within the course of their employment. *Varsity Amusement Co. v. Butters*, 155 Colo. 330, 394 P.2d 603 (1964); *Sieck v. Trueblood*, 29 Colo. App. 432, 485 P.2d 134 (1971); *Nelson v. Harding*, 29 Colo. App. 76, 480 P.2d 851 (1970). [The last two cases involved motions for summary judgment which were granted in favor of the defendant upon a finding that the plaintiff and the defendants were co-employees.]

In its opinion, the Court of Appeals makes no mention of the statutory bar nor does it appear that the court even considered such provision. The court's failure to apply this provision constitutes error and directly conflicts with the pertinent Colorado case law which has assessed the effect of the statute. In essence, the court has created a right in the Respondents to pursue their actions, when this right is specifically denied to the Respondents by the laws of Colorado. Such action by the Court of Appeals is manifestly contrary

to this Court's mandate in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945).

Moreover, it appears that the United States Court of Appeals sought to circumvent the effect of this statutory provision by disregarding the state proceedings which determined that George W. McCormick, Gerald Finnerman, and Robert Sparr were employees of Schenck, and therefore, co-employees. In its opinion, the Court of Appeals failed to comprehend the effect of the Division of Labor's finding. The Court states that "McCormick's employment status in the [workmen's] compensation case was limited to a special temporary employment. It is not determinative as to his permanent status" (*infra*, page A-18) — which the court believes is subject to litigation.

However, upon reading the Workmen's Compensation Act and the applicable state decisions, it is manifest that no such "special temporary employment" status is provided for or contemplated in the Act; nor was such a distinction mentioned in the Referee's Order or the Colorado Court of Appeals' decision. An employee's status is determined at the time of the accident — and at that time only. No reference is made to a permanent status as opposed to a temporary one. Under the Act, if the Division of Labor finds that various people are co-employees at the moment an injury is sustained, this factual determination is binding upon those co-employees. *State Compensation Insurance Fund v. Luna*, 156 Colo. 106, 110, 397 P.2d 231, 234 (1964), and precludes further action.

Furthermore, the Court of Appeals is incorrect in stating that the "applicable standards for determining the question of employer relationship" in the compensation case and in the Respondent's actions are different (*infra*, page A-18). In an adversary proceeding, the Division of Labor specifically found that George W. McCormick was an employee of Schenck at the time the accident occurred which also involved

Finnerman and Sparr. This factual determination was affirmed by the Colorado Court of Appeals. The same facts must apply to the actions initiated by the Respondents and, under Colorado law, the state determination bars McCormick's co-employees, Finnerman and Sparr, from any other proceeding. The issue was clearly settled that George W. McCormick was an employee of Schenck at the time of the accident and that his relationship with Petitioner Sunset Drive-In Theatre before the accident was not important. By endeavoring to set forth a different standard for ascertaining McCormick's employment status, the Court of Appeals again ignores the effect of the Act and the state administrative and judicial proceedings which interpreted and applied the Act to the factual situation presented to this Court.

The Court of Appeals' opinion also directly conflicts with Colorado law in that the court assumed Petitioner, Sunset Drive-In Theatre, was vicariously liable for George W. McCormick's acts. In the first instance, the Court of Appeals makes a controlling inference regarding Sunset Drive-In Theatre's right of control over George W. McCormick. This inference was not supported by the record before the court nor was it made by the trial judge. In so doing, the court disregards the principles which it sets forth in *Hodgson v. Okada*, 472 F.2d 965, 969 (10th Cir. 1973), to the effect that an appellate court may not make a controlling inference which the trial court has not made nor may the appellate court substitute its judgment for that of the trial court.

Secondly, based upon such inference, the United States Court of Appeals stated that the state proceedings were not determinative of George W. McCormick's dual employment status and, therefore, subjected it to litigation by the Respondents. However, the Colorado cases cited by the court in support of its decision clearly set forth the rule that a general employer will be vicariously liable for his agent's acts only when the contract for service was made directly between the gen-

eral employer and a special employer. The state proceedings found that McCormick and Schenck entered into a contract for hire. Thus, as Sunset Drive-In Theatre was not involved in the contract between George W. McCormick and Schenck, it cannot be held liable for McCormick's conduct at the time of injury when McCormick was in Schenck's employment. The importance of the contract in establishing liability between a general and a special employer was re-emphasized in *Colwell v. Oatman,* 510 P.2d 464 (Colo. App. 1973).

A third point regarding Petitioner Sunset Drive-In Theatre and applying to Petitioner McCormick relates to the Court of Appeals' failure to incorporate and to apply the most recent statement of the Colorado Supreme Court on the matter of collateral estoppel as set forth in *Pomeroy v. Waitkus,* 517 P.2d 396, 400 (Colo. 1973). In this case, the state court notes that if a key issue can be determined by reference to one factual setting, and in fact, that issue is fully litigated, no further litigation can be commenced upon that issue. Therefore, the Court of Appeals should have ruled that the respondents were estopped from relitigating the issue of George W. McCormick's employment status — which was decided in the state administrative and judicial proceedings.

2. The efficacy of the Colorado Workmen's Compensation Act is jeopardized by the United States Court of Appeals' Decision.

It is respectfully submitted that the policy and purpose underlying Colorado's Workmen's Compensation Act are in jeopardy due to the United States Court of Appeals' decision. In creating an artificial distinction between "permanent" employment and "special temporary" employment — as the term arises and applies under the Act, the court in theory would allow an injured employee to receive double recovery. As presented by the court, an injured employee: (1) may receive benefits under the act from his "permanent" employer

(his co-employee's "special temporary" employer); and (2) then seek damages at law from his co-employee and his co-employee's "permanent" employer. It is manifest that such double recovery subverts the main purpose of the Act which is to grant compensation and preclude needless litigation. The Act is designed to ensure that an injured employee will be fully compensated, to relieve an employer from further obligation if he complies with the Act, and to relieve a co-employee or a third party from liability if the injured employee elects to receive benefits under the Act. In essence, the Act provides an exclusive remedy if the injured employee elects to receive benefits under the Act. However, as a result of the United States Court of Appeals' decision, any person and his "permanent" employer are subject to an action brought by a co-employee who has already been fully compensated. The Court of Appeals failed to give serious consideration to the effect of its decision upon Colorado Workmen's Compensation Act, and therefore, it is imperative that the decision be reviewed by this Court.

CONCLUSIONS

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted.

G. Walter Bowman
of YEGGE, HALL & EVANS
Attorneys for Petitioner
1340 Denver Club Building
Denver, Colorado 80202

September, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GERALD W. FINNERMAN and FIREMAN'S FUND AMERICAN INSURANCE COMPANY,
Plaintiffs,

vs.

HAROLD L. MCCORMICK, Executor of the Estate of George William McCormick, Deceased, and SUNSET DRIVE-IN THEATRE,
Defendants.

CONSOLIDATED

Civil Action No. C-1987

RICK ROBERT SPARR, SHIRLEY A. SPARR, and FIREMAN'S FUND AMERICAN INSURANCE COMPANY,
Plaintiffs,

vs.

HAROLD L. MCCORMICK, Executor of the Estate of George William McCormick, Deceased, and SUNSET DRIVE-IN THEATRE,
Defendants.

Civil Action No. C-1988

AUBREY SCHENCK ENTERPRISES, INC.,
Plaintiff,

vs.

HAROLD L. MCCORMICK, Executor of the Estate of George William McCormick, Deceased, and SUNSET DRIVE-IN THEATRE,
Defendants.

Civil Action No. C-2011

JUDGMENT AND ORDER ON SUMMARY JUDGMENT MOTIONS

THIS MATTER having come on for hearing this date upon motions for summary judgment, and the Court having

heard arguments of counsel and being duly advised, and having determined that the motions should be granted in Civil Actions Nos. C-1987 and C-1988 and that there is no just reason for delay for the entry of final judgment; it is

ORDERED that the action and complaint and intervenor's complaint in each of actions C-1987 and C-1988 are hereby dismissed with prejudice, and that the defendants, above-named, have and recover of the plaintiffs named in said respective actions, judgment for their costs to be taxed by the Clerk upon the filing of a Bill of Costs; and it is further

ORDERED that the defendants' Motion for Summary Judgment in Action No. C-2011 is hereby denied.

DATED at Denver, Colorado, this 27th day of July, 1973. 1973.

BY THE COURT:

HATFIELD CHILSON

United States District Judge.

Our court has also held that collateral estoppel does not apply where the issue emerges differently in two different contexts. *See* Embry v. Equitable Life Assurance Society, 451 F.2d 472 (10th Cir. 1971), *cert. denied*, 405 U.S. 1041 (1972). To the same effect is Young & Company v. Shea, 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969).

As we view it, then, confusion is apt to arise as a result of a mechanical application of the doctrine of collateral estoppel. In the present suit the plaintiffs are not seeking to disprove that McCormick was an employee of Schenck at the time of the airplane crash. They are seeking to establish a positive and not inconsistent thesis, namely, that McCormick was generally an agent of (or a partner in) Sunset Drive-In Theatre.

In adjudicating the present question it is important to be mindful that the Workmen's Compensation Act is broadly and liberally construed so as to provide just compensation for workmen and their families for injuries during employment. *See* University of Denver, et al. v. Nemeth, et al., 127 Colo. 385, 257 P.2d 423 (1953); L.B. Cole Produce Co. v. Industrial Commission, 123 Colo. 278, 228 P.2d 808 (1951); Continental Oil Co., et al. v. Sirhall, et al., 122 Colo. 322, 222 P.2d 612 (1950). Thus, the Compensation Act emphasizes the objective of protection of employees and in carrying out this objective gives a broad interpretation to the term "employee." *See* Martin K. Eby Construction Co. v Industrial Commission, 151 Colo., 377 P.2d 745 (1963); Divelbliss v. Industrial Commission, 140 Colo. 452, 344 P.2d 1084 (1959). In seeking to carry out the purposes of the Act, employment has been found to exist in unexpected circumstances. *See* Continental Oil Co., et al. v. Sirhall, et al., *supra*, 612 at 613, wherein the Colorado court said:

> [A]n obligation [to pay workmen's compensation] may, in proper cases, be imposed against an owner

> where the common-law relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition. 222 P.2d at 613.

In view, then, of the vast difference between workmen's compensation procedures and the methods which obtain in a courtroom, it cannot be said that the adjudication before the Industrial Commission precludes the prosecution of the present case and the litigation of the issue of agency. Indeed, McCormick's permanent employment would appear to have been with the Sunset Theatre and from all that is apparent in this record Sunset was ultimately responsible for his activities in that it had the underlying right to direct his actions. *Cf.* Landis v. McGowan, 114 Colo. 355, 165 P.2d 180 (1946), and Chartier & Industrial Commission v. Winslow Crane Service Co., 142 Colo. 294, 350 P.2d 1044 (1960). *See also* Restatement of Agency 2d § 226, which states that a person may serve two masters if the service to one does not involve abandonment of the service to the other.

Having reached the conclusion that the issues in the proceedings are substantially disparate in their purposes, we need not deal with the question as to whether these plaintiffs were somehow in privity with either Fireman's Fund Insurance Company or Schenck in the compensation proceedings. That is irrelevant. Were we to consider it, however, we would be hard pressed to hold that privity existed.

One further observation: we fail to see that even if collateral estoppel were applicable that it could apply to bar plaintiffs' action against Sunset Drive-In Theatre which was in no manner related to the proceedings before the Colorado Industrial Commission.

Seeing no legal bar to appellants asserting that McCormick was acting in the course of primary employment, we must rule that the court erred in granting summary judgment.

The judgment is reversed and the cause remanded for a trial.

Filed
June 3, 1974

Howard K. Phillips

Clerk, United States
Court of Appeals
Tenth Circuit

STATE OF COLORADO
BEFORE THE DEPARTMENT OF
LABOR AND EMPLOYMENT
DIVISION OF LABOR

CLAIMANT IN THE MATTER OF THE DEATH OF GEORGE WILLIAM MCCORMICK, *Decedent,*	WC 2-331-149
VS.	
AUBREY SCHENCK ENTERPRISES, INC., *Employer,*	
and	
FIREMAN'S FUND INSURANCE COMPANY, *Insurer, Respondents.*	ORDER

Claimant appeared in person and by Don R. Evans and respondents appeared by James E. Tarter. Hearing was held March 10, 1971 in Canon City, Colorado and a deposition was taken for the use of the Division of Labor on April 2, 1971, at 107 South Broadway, Los Angeles, California, with the Referee present.

Facts adduced at the hearing and deposition were as follows:

A claim was filed within the statutory time by the widow of the deceased, George W. McCormick.

A denial of this claim was filed by the respondent insurer, Fireman's Fund Insurance Company, on the grounds that at the time of the accident in question the deceased, George

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 73-1708 and 73-1709

GERALD W. FINNERMAN and RICK ROBERT SPARR and SHIRLEY A. SPARR,

Plaintiffs-Appellants.

vs.

HAROLD L. MCCORMICK, Executor of the Estate of George William McCormick, deceased, and SUNSET DRIVE-IN THEATRE, a co-partnership,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. Nos. C-1987 and C-1988)

Robert A. Dufty of Friedman, Bader & Dufty for Plaintiffs-Appellants.

Don R. Evans of Yegge, Hall & Evans for Defendants-Appellees.

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

DOYLE, Circuit Judge

In this diversity action damages are sought for the wrongful death of Robert Sparr and serious injuries to Gerald Finnerman which occurred in the crash of a Piper aircraft. This took place on July 11, 1969. One George McCormick, the pilot of the plane, was also killed. This action is against the McCormick estate and the Sunset Drive-In Theatre, the owner of the airplane and the alleged employer of George McCormick, deceased.

The purpose of this flight was to observe whether certain air shots of a raft which was being pulled across a reservoir would be successful for use in a motion picture which was then being filmed. Aubrey Schenck Enterprises, Inc. was the producer of the movie. Certain scenes of the movie were shot in Brush Hollow Reservoir, near Canon City, Colorado. On one of the passes over the site, the crash took place.

Plaintiffs in this action are Gerald Finnerman and the widow and son of Robert Sparr. It is alleged that the pilot McCormick and Sunset Drive-In Theatre, owner of the plane, are responsible for the serious injuries and deaths.

The Fireman's Fund Insurance Company intervened as a plaintiff on the basis that it had paid Finnerman and Sparr workmen's compensation benefits on behalf of the producer of Schenck Enterprises. The latter company also filed an action against the estate of George McCormick seeking damages for McCormick's negligent interruptions of the Schenck motion picture. This latter suit was consolidated with the Finnerman and Schenck action.

The complication arises from the fact that the widow of George McCormick filed a claim before the Colorado Division of Labor in which Aubrey Schenck Enterprises, Inc. and Fireman's Fund Insurance were named as respondents. This asserted that at the time of the death of McCormick he was an employee of Schenck Enterprises so that the claimant, Marine Wood McCormick, was entitled to workmen's com-

pensation benefits. Pending the determination of the claim by the Division of Labor, the present action was held in abeyance. The Referee of the Colorado Division of Labor held that Schenck Enterprises had employed George McCormick to fly Finnerman and Sparr over the motion picture site and that this was in the usual course of business of Schenck Enterprises. It was further held that compensation was to be paid. The Colorado Court of Appeals upheld this determination, citing Industrial Commission v. Allen, 28 Colo. App. 546, 478 P.2d 702 (1970).

Based on the decision of the Court of Appeals, defendants filed a motion for summary judgment, contending that this adjudication was conclusive as against these plaintiffs on the issue of McCormick's having been an employee of Schenck. This motion for summary judgment was granted on the ground that Finnerman and Sparr were bound by this adjudication and could not contend in the present action that McCormick was anything other than a co-employee of Finnerman and Sparr. Therefore, the issue on this appeal is whether the decision rendered by the Colorado Division of Labor that McCormick was an employee of Schenck Enterprises is binding on these plaintiffs so as to bar the present action and so as to preclude them from contending that he was solely an employee of the theatre or not an employee of Schenck's in the context of this present action.

It is our conclusion that the adjudication by the Industrial Commission affirmed by the Colorado Court of Appeals in the proceeding involving the claim by the widow of McCormick against Schenck does not constitute a bar to the present action. Appellees maintain that the issue as to whether McCormick was the co-employee of Finnerman and Sparr has been adjudicated in a binding way by the Industrial Commission and the Colorado Court of Appeals in the McCormick-Schenck proceeding. We are of the opinion, however, that the

plaintiffs are at liberty to litigate the liability of McCormick, the pilot of the airplane, and that the Sunset Drive-In, the owner of the plane since that issue has not been determined.

Appellees say that the doctrine of *res judicata* applies. This doctrine precludes relitigation of a *judgment* on the merits in a prior suit which involved the same parties or their privies. A related doctrine is that of collateral estoppel which precludes relitigation of *issues* actually litigated and determined in a prior suit regardless of whether based on the same cause. *See* Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955).

The two causes of action at bar are distinct. The workmen's compensation case was a dispute between McCormick's widow and Schenck under the Workmen's Compensation Act. The present case is an ordinary tort action in which different plaintiffs seek recovery against different defendants. More important than the difference in parties is the fact that McCormick's employment status in the compensation case was limited to a special temporary employment. It is not determinative as to his permanent status. The issue is not the same.

Not only are the fact situations different, but the applicable standards for determining the question of employer relationship are also different in the two instances. Before the Compensation Commission a liberal view is taken and the presumption favors a finding of an employee relationship. McCormick's relationship to Schenck was a special temporary one. Schenck was employing him and the airplane for a limited time and a particular purpose. This did not exclude proof in another suit that McCormick's permanent employer was Sunset Drive-In which owned the plane and with which he had a vicarious relationship.

Professor Moore in his work on federal practice recognizes this exception to the collateral estoppel doctrine. *See* 1B Moore's Federal Practice ¶ 0.443[2].

W. McCormick, was an independent contractor and not an employee of the respondent employer, Aubrey Schenck Enterprises, Inc.

The respondent employer is engaged in the motion picture business and in particular was the producer of a film known by its title name "Barquero." This film was made, at least in part, during the summer of 1969, and one of the sites of the film was a place called Brush Reservoir near Canon City, Colorado in Fremont County. On July 11, 1969, one Karol Smith, in his capacity as location coordinator for the respondent employer, employed the deceased, George W. McCormick, to fly the motion picture director, one Robert Sparr, and the motion picture director of photography, one Gerald Finnerman, over the motion picture site at Brush Hollow Reservoir.

The Referee finds that the reason for the plane trip over Brush Hollow Reservoir was so the director of the motion picture and the director of photography could observe whether air shots of a raft being pulled across Brush Hollow Reservoir were feasible for use in the motion picture. It has previously come to the respondent employer's attention that cables used to pull a raft across Brush Hollow Reservoir were visible from the air. The Referee finds that such a trip for this purpose was in the usual course of the trade, business and profession of the respondent employer.

No sum of money or remuneration was agreed upon between the respondent employer and the deceased, George W. McCormick, for the performance of this service by George W. McCormick. However, the Referee specifically finds that nevertheless it was the intention of the parties to compensate the deceased for his employment services, and therefore, a contract of hire was entered into between the deceased and the respondent employer and that the deceased was performing a valuable service for the employer.

The Referee finds that the deceased had been employed by the respondent employer on at least one occasion prior to July 11, 1969 as an extra in another film that was produced by the respondent employer. The Referee finds that the evidence so indicates that no agreement as to the amount of pay was made prior to the time the deceased commenced working as an extra but that thereafter the deceased had been paid for his work and this was the normal manner of conducting business as followed by the respondent employer.

On July 11, 1969, the plane trip referred to above was taken with the deceased flying his own aircraft over the Brush Hollow Reservoir site. On one of the passes across the site, the plane crashed killing George William McCormick as well as the director, Robert Sparr, and injuring the director of photography, Gerald Finnerman.

The Referee further finds from the affidavit filed herein that the fair payment for the employment of the deceased in flying the two passengers over Brush Hollow Reservoir would be $10 for an approximate thirty minute trip, and therefore, under the Workmen's Compensation Law, the claimant's widow is entitled to maximum benefits.

The Referee further finds that the deceased left surviving him only one sole dependent his spouse, Marine Wood McCormick, who resides at 425 North 15th, Canon City, Colorado.

The Referee further finds that the claimant has incurred and paid funeral expenses in excess of $500.00.

The Referee, therefore, finds that the deceased, George William McCormick, was fatally injured on July 11, 1969, as the result of an accident arising out of and within the course of his employment.

IT IS, THEREFORE, ORDERED: That respondents be directed to pay compensation in the sum of $257.83 per

month beginning July 12, 1969, first payment due August 12, 1969, as follows:

> To Marine Wood McCormick the sum of $257.83 per month for the sole use and benefit of herself;

said payments to continue until the total sum of $18,623.50 shall have been paid or until further order of this Division.

IT IS FURTHER ORDERED: That respondents pay for the necessary medical, surgical and hospital expense incurred as a result of said accident but not to exceed $5,000.00 in value.

IT IS FURTHER ORDERED: That respondents pay the statutory funeral benefits of $500.00 to the surviving spouse, Marine Wood McCormick, and file a receipt with this Division showing payment of the same.

IT IS FURTHER ORDERED: That this Division hereby retains jurisdiction of this claim until the same is finally and fully closed.

IN WITNESS WHEREOF, the Division of Labor has caused these presents to be duly executed, this 10th day of May, A.D., 1971.

DIVISION OF LABOR
WORKMEN'S COMPENSATION
SECTION

BY _____
REFEREE

WGK:dmg

BEFORE THE INDUSTRIAL COMMISSION
OF COLORADO

W.C. NO. 2-331-149

CLAIMANTS IN THE MATTER OF THE DEATH OF GEORGE WILLIAM McCORMICK,
Deceased,

vs.

AUBREY SCHENCK ENTERPRISES, INC.,
Employer,

and

FIREMAN'S FUND INSURANCE COMPANY,
Insurer,
Respondents.

FINDINGS OF FACT AND AWARD

In the above-entitled cause the Commission, having reviewed the entire file as prayed by the respondent's Petition for Review filed herein August 24, 1971, and now being sufficiently advised in the premises, finds:

That a claim was filed within the statutory time by the widow of the deceased, George W. McCormick;

That a denial of this claim was filed by the respondent insurer, Fireman's Fund Insurance Company, on the grounds that at the time of the accident in question the deceased, George W. McCormick, was an independent contractor and not an employee of the respondent employer, Aubrey Schenck Enterprises, Inc.

That the respondent employer is engaged in the motion picture business and in particular was the producer of a film known by its title name "Barquero." The film was made, at

least in part, during the summer of 1969, and one of the sites of the film was a place called Brush Reservoir near Canon City, Colorado in Fremont County. On July 11, 1969, one *Karol Smith,* in his capacity as location coordinator for the respondent employer, *employed the deceased,* George W. McCormick, to fly the motion picture director, one Robert Sparr, and the motion picture director of photography, one Gerald Finnerman, over the motion picture site at Brush Hollow Reservoir.

The Commission further finds that the reason for the plane trip over Brush Hollow Reservoir was so the director of the motion picture and the director of photography could observe whether air shots of a raft being pulled across Brush Hollow Reservoir were feasible for use in the motion picture. It has previously come to the respondent employer's attention that cables used to pull a raft across Brush Hollow Reservoir were visible from the air. The Commission finds that such a trip for this purpose was *in the usual course of the trade,* business and profession of the respondent employer.

No sum of money or remuneration was agreed upon between the respondent employer and the deceased, George W. McCormick, for the performance of this service by George W. McCormick. However, the Commission specifically finds that nevertheless it was the intention of the parties to compensate the deceased for his employment services, and therefore, a *contract of hire was entered* into between the deceased and the respondent employer and that the deceased was performing a valuable service for the employer.

The Commission further finds that the deceased had been employed by the respondent employer on at least one occasion prior to July 11, 1969, as an extra in another film that was produced by the respondent employer. The Commission finds and the evidence so indicates that no agreement as to the amount of pay was made prior to the time the deceased

commenced working as an extra but that thereafter the deceased had been paid for his work and this was the normal manner of conducting business as followed by the respondent employer.

On July 11, 1969, the plane trip referred to above was taken with the deceased flying his own aircraft over the Brush Hollow Reservoir site. On one of the passes across the site, the plane crashed killing George William McCormick as well as the director, Robert Sparr, and injuring the director of photography, Gerald Finnerman.

The Commission further finds from the affidavit filed herein that the fair payment for the employment of the deceased in flying the two passengers over Brush Hollow Reservoir would be $10 for an approximate thirty minute trip, and therefore, under the Workmen's Compensation Law, the claimant's widow is entitled to maximum benefits.

The Commission further finds that the deceased left surviving him only one sole dependent his spouse, Marine Wood McCormick, who resides at 425 North 15th. Canon City, Colorado.

The Commission further finds that the claimant has incurred and paid funeral expenses in excess of $500.00.

The Commission, therefore, finds that the deceased, George William McCormick, was fatally injured on July 11, 1969, as the result of an accident arising out of and within the course of his employment.

The Commission further finds that the respondents' Motion for Withdrawal of Documents should be denied.

IT IS, THEREFORE, ORDERED: That respondents be directed to pay compensation in the sum of $257.83 per

month beginning July 12, 1969, first payment due August 12, 1969, as follows:

> To Marine Wood McCormick the sum of $257.83 per month for the sole use and benefit of herself;

said payments to continue until the total sum of $18,623.50 shall have been paid or until further Order of the Division of Labor or Industrial Commission.

IT IS FURTHER ORDERED: That respondents pay for the necessary medical, surgical and hospital expenses incurred as a result of said accident but not to exceed $5,000.00 in value.

IT IS FURTHER ORDERED: That respondents pay the statutory funeral benefits of $500.00 to the surviving spouse, Marine Wood McCormick, and file a receipt with the Division of Labor showing payment of the same.

IT IS FURTHER ORDERED: That the respondents' Motion for Withdrawal of Documents be, and the same is, hereby dismissed and denied.

IN WITNESS WHEREOF, the Industrial Commission of Colorado has caused these presents to be duly executed, this 1st day of November, A.D., 1971.

INDUSTRIAL COMMISSION OF COLORADO

KENNETH C. RUSSELL
CHESTER L. HOSKINSON
COMMISSIONERS

ATTEST:

RICHARD E. MOSS
EXECUTIVE SECRETARY

WGK:dmg

AUBREY SCHENCK ENTERPRISES, INC.,
and Fireman's Fund Insurance Company,

Petitioners,

vs.

MARINE WOOD McCORMICK, Claimant in the Matter of the Death of George William McCormick et al.,

Respondents.

No. 71-490

Colorado Court of Appeals,

Div. II.

Oct. 25, 1972.

Rehearing Denied Nov. 14, 1972.

Not Selected for Official Publication.

Tarter & Tarter, James E. Tarter, Colorado Springs, for petitioners.

Yegge, Hall & Evans, Don R. Evans, Denver, for respondent Marine Woods McCormick, claimant.

Duke W. Dunbar, Atty. Gen., John P. Moore, Deputy Atty. Gen., Peter L. Dye, Asst. Atty. Gen., for respondents Industrial Comm. of Colo. and Director, Division of Labor.

PIERCE, Judge.

George McCormick died as the result of injuries sustained in an airplane crash. His widow filed a claim for compensation with the Colorado Industrial Commission, alleging that he was killed while flying pursuant to an employment agreement with Aubrey Schenck Enterprises (Schenck). The Commission affirmed the finding of the referee that McCormick

was in fact an employee of Schenck at the time of the accident. Schenck appeals that determination. We affirm.

The relevant facts of this case are for the most part undisputed. Schenck, a California corporation which produces motion pictures, was on location for the filming of a movie in Fremont County, Colorado in the summer of 1969. McCormick, the owner of a motion picture theater in Canon City, Colorado, had worked as an extra for Schenck while Schenck was in the area during another film. The dispute in this case arises out of service McCormick performed for Schenck during July 1969.

McCormick, while flying his airplane in the vicinity of one of the sets for the proposed movie, noticed that an underwater cable which was to pull a barge, one of the central sets in the picture, was visible from the air. He advised the director of the movie, Robert Sparr, of this fact. Since it was apparently the intention of Sparr to have aerial views of this barge, he was concerned that the results would be unacceptable if the cable was in fact visible from the air. In order to decide whether they could proceed with their plans for the aerial photography, it was determined that it would be necessary for Sparr and his director of photography, Gerald Finnerman, to view the scene from the air.

Aubrey Schenck, the executive producer, upon being informed of this dilemma, advised Sparr and Finnerman that he would make arrangements to have George McCormick take Sparr and Finnerman for a flight over the movie location. Schenck, unable to make contact with McCormick, asked Karol Smith, a resident of Canon City and liaison for the company while it was in the area, to call McCormick and request that McCormick take Sparr and Finnerman over the location. Smith did this and McCormick agreed. The plane crashed, killing McCormick and Robert Sparr, and severely injuring Gerald Finnerman.

The sole issue on appeal is whether there is evidence in the record to support the Commission's finding that McCormick was an employee of Schenck Enterprises. It is undisputed that there was no specific arrangement made for pay prior to the flight. However, there was conflicting evidence as to the custom of the movie industry in paying people who work for them on the scene. McCormick's widow and his brother testified that, when they had done work for the movie industry in the past, they were paid even when there was not a prior arrangement. Karol Smith testified that, although no arrangement was made prior to this flight, he was confident that McCormick would have been paid for his services.

[1] On appeal, Schenck and its insurer contend that the evidence was totally inadequate to show that the deceased was an employee of Schenck. Specifically, they contend that there is no evidence from which the referee could conclude that there was a contract of employment, either express or implied, because there was no evidence that pay was intended, or that the work was done in the usual course of trade or business. Schenck further contends that the evidence strongly suggests that McCormick was a volunteer, working entirely for his own benefit. These matters are questions of fact, and where there is competent evidence in the record to support the Commission in its conclusions with regard to such facts, this court will not disrupt those findings on review. Industrial Commission v. Allen, 28 Colo. App. 546, 478 P.2d 702. While we might have come to different conclusions from the same facts, it is beyond our power to disturb the Commission's findings.

Schenck next contends that if McCormick was not a volunteer, he was an independent contractor rather than an employee, and thus was not entitled to compensation from Schenck. The evidence concerning the status of McCormick was in conflict and susceptible of conflicting inferences. Al-

though the evidence would have supported a finding that McCormick was an independent contractor, it also supports the referee's finding that McCormick was an employee. Under these circumstances, the Commission's findings will not be disturbed on review. Industrial Commission v. Allen, *supra*. *See* 1A, A. Larson, The Law of Workmen's Compensation § 45.

[2] Schenck's final contention is that certain documents were admitted into evidence which should not have been considered by the Industrial Commission. Specifically, the initial reports of several insurance investigators were submitted into the Commission's file of the case. 1969 Perm. Supp., C.R.S. 1963, 80-1-22, sets forth the standard for admission of evidence in Industrial Commission cases. That section states that the admission of such evidence is within the sound discretion of the Commission, and since there was enough competent evidence to support the findings without these documents, we perceive no reversible error.

Order affirmed.

DWYER and ENOCH, JJ., concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-355

HAROLD L. McCORMICK, EXECUTOR OF THE ESTATE OF GEORGE WILLIAM McCORMICK, DECEASED, AND SUNSET DRIVE-IN THEATRE, A CO-PARTNERSHIP,

Petitioners,

VS.

GERALD W. FINNERMAN AND RICK ROBERT SPARR AND SHIRLEY SPARR,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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October, 1974

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STATEMENT OF THE CASE

Respondents generally adopt Petitioners' statement of the case except to point out that Petitioners' use of the phrase "was employed by" in reference to McCormick's relationship with Schenck in paragraph two of their statement of the case may be somewhat misleading in that it pre-determines the issue to be decided by this Court.

ARGUMENT

1. Petitioners begin their argument by contending that Section 81-4-4 of the Colorado Workmen's Compensation Act, as amended 1967, creates a statutory bar to the pursuit of a claim by an "employee" electing to receive benefits under the Compensation Act against a "co-employee". Yet, this argument presupposes that a determination whether one is an

"employee" and "co-employee" has already been made. In fact, the central question in this proceeding is whether a determination of employee status by the Colorado Division of Labor and the Colorado Court of Appeals in a Workmen's Compensation suit determines that issue for all time in all other proceedings. Thus, Petitioners' argument alleging conflict with Section 81-4-4 *supra*, is not very helpful.

As to the central issue — the alleged *res judicata* or collateral estoppel effect of a determination of employee status by the Colorado Division of Labor — Respondents adopt in its entirety the opinion of the Tenth Circuit Court of Appeals. The two causes of action in this proceeding (the Workmen's Compensation cause and the common law Federal Court cause) are distinct. True, they are both concerned with a determination of "employee" status, but in very different procedural and statutory contexts. As Justice Holmes stated in *Towne v. Eisner*, 245 U.S. 418 (1918), with regard to the definition of "income" in the U.S. Constitution and a statute, "But it is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to circumstances and the time in which it is used." (citation omitted). As the Tenth Circuit pointed out in its opinion, the standards applied in deciding "employee" status in Workmen's Compensation proceedings under the Colorado Act and in common law proceedings are very different. There would clearly be no inconsistency in findings from the same set of facts of "employee" status under the Compensation Act and "non-employee" status in a common law proceeding. The issues are distinct in the two proceedings and a decision in one forum cannot act as a bar to a determination of that issue in the other forum.

Even if the issues were not distinct, *res judicata* or collateral estoppel could not operate to bar Respondents' claims.

The U.S. District Court, in granting Petitioners' Motion For Summary Judgment, was clearly not following the dictates of *Pomeroy v. Waitkus,* 517 P.2d 396 (Colo. 1973), the Colorado Supreme Court's most recent exploration of the subjects of *res judicata* and collateral estoppel. Four tests were there enunciated for the application of either theory:

> First, was the issue decided in the prior adjudication identical with the one presented in the action in question? Second, was there a final judgment on the merits? Third, was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? And, fourth, did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication? *Pomeroy v. Waitkus, supra,* at 399.

Tests one, three and four were not satisfied by the facts in this case. First there was no identity of the issues in the two proceedings (a widow suing under the Colorado Workmen's Compensation Act vis-a-vis tort claims by Respondents herein). Second, there was no identity of the relief sued for (Workmen's Compensation benefits vis-a-vis damages for personal injury and wrongful death). Third, the parties were certainly not the same or in privity (Marine Wood McCormick, the Industrial Commission of Colorado, the Director of Division of Labor v. Aubrey Schenck Enterprises, Inc. and Fireman's Fund Insurance Company, Petitioners vis-a-vis Gerald W. Finnerman and Rick Robert Sparr and Shirley A. Sparr v. Harold L. McCormick, Executor of the Estate of George William McCormick, deceased, and Sunset Drive-In Theatre, a copartnership). And, fourth, it is clear that Respondents had no opportunity to litigate their claims in the prior proceeding. Respondents have never had their day in Court. It appears obvious therefore that the trial court erred when it gave *res judicata* effect to the Colorado decision and dismissed Respondents' claims herein.

In no event can the Colorado Court of Appeals decision be relied upon to dismiss the Respondents' claims against Co-Petitioner Sunset Drive-In Theatre. Even if, in arguendo, these Respondents were held to be bound by the Colorado determination that George McCormick was an employee of Aubrey Schenck Enterprises, Inc., and thus a fellow employee of theirs, this would not bar their claims against the Sunset Drive-In theatre since both Colorado law and the decision of the tenth Circuit recognize the concepts of a loaned employee and dual employment. See *Kelley v. Summers,* 210 F.2d 665 (Tenth Cir. 1954); *C. & S. Railway Company v. Duffy Company,* 145 Colo. 344, 361 P.2d 144 (1961); *Chartier v. Winslow Crane Service Company,* 142 Colo. 294, 350 P. 2d 1044 (1960). The Respondents herein have continuously and strongly asserted that George William McCormick's position was one of employment with Sunset Drive-In Theatre. This matter has never been litigated, therefore dismissing these Respondents' claims against that Petitioner was improper.

As set forth in the RESTATEMENTS OF JUDGMENTS (1942), Section 82:

> "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves."

See also *C. H. Elle Construction Co. v. Western Casualty & Surety Company,* 261 F.2d 533 (Ninth Cir. 1958).

Petitioners allege in part two of their reasons for granting the writ, that "double recovery" for an injured employee is possible if the Tenth Circuit opinion is followed. They allege that this "double recovery" subverts the purpose of the Workmen's Compensation Act. Yet, they do not point out how they arrive at that "purpose" nor why they consider a possible recovery in the common law cause herein to be a "double

recovery". Under the Workmen's Compensation Act and the common law, if one can be an "employee" for one purpose, and a "non-employee" for another, and we believe it is clear that he can, then there is no "double recovery" and no conflict with the purpose of the Workmen's Compensation Act. Further, because the Respondents herein have absolutely no connection with Mrs. McCormick, there could in no way be "double recovery" if they were to prevail in their tort claim.

2. Respondents next bring to the Court's attention Petitioners' total failure to comply with the terms of U.S. Sup. Ct. Rule 23(d), 28 U.S.C.A. Not only have they failed to include a complete citation to the Colorado Workmen's Compensation Act (a statute clearly involved in and important to this case) in the manner and order specified by Rule 23, but nowhere in the Petition or Appendices is there set out verbatim the pertinent text of that statute as called for by Rule 23(d). For this shortcoming, Respondents ask the Court, pursuant to *School District v. St. Joseph F. & M. Ins. Co.*, 101 U.S. 472, (1880), to deny Petitioners' Petition for Certiorari.

CONCLUSION

For each of the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals should be denied.

Respectfully submitted,
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